TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

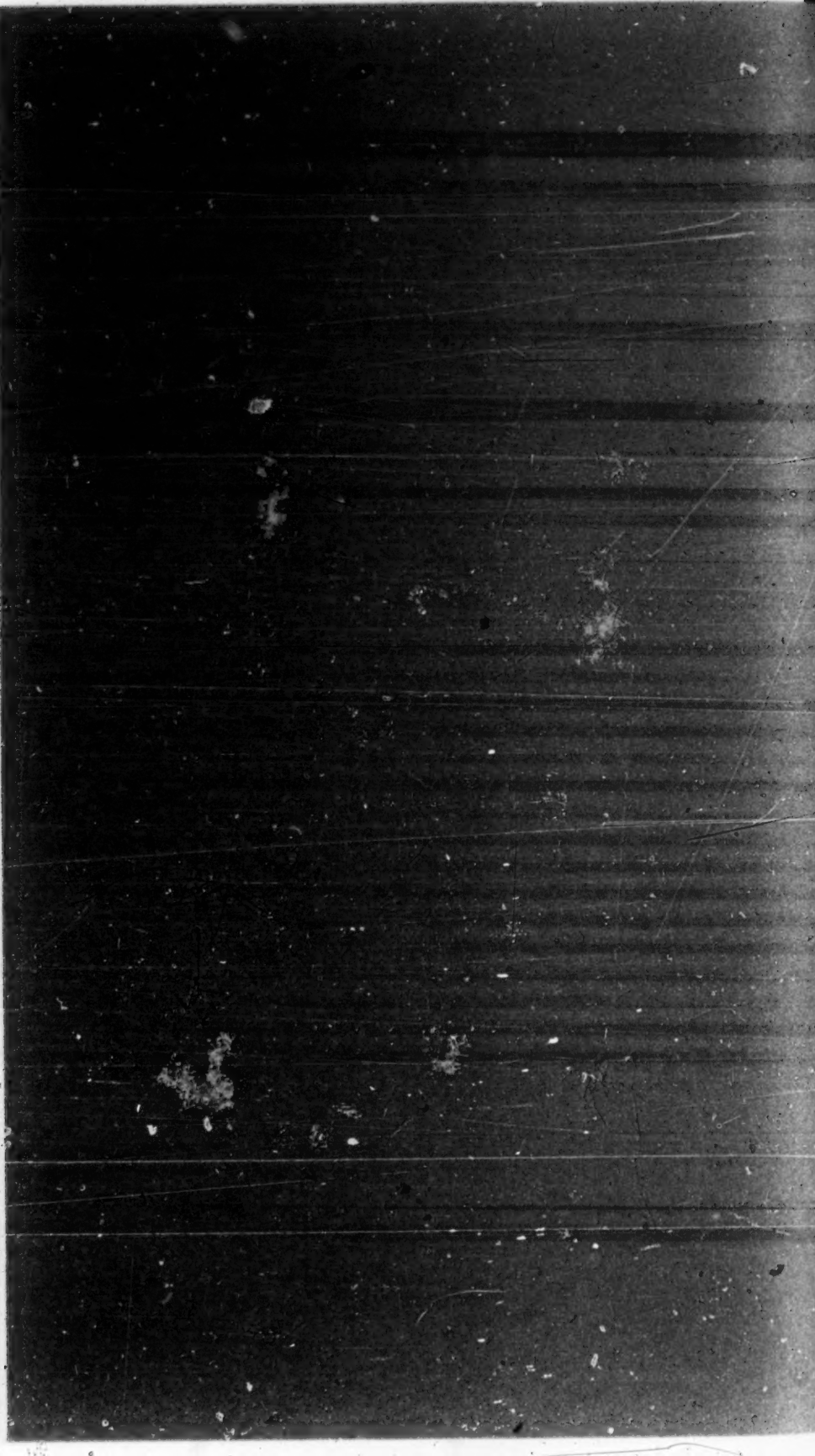
WALTER SCHILLING, PETITIONER,

vs.

WILLIAM P. ROGERS, ATTORNEY GENERAL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 18, 1959
CERTIORARI GRANTED OCTOBER 26, 1959



SUPREME COURT OF THE UNITED STATES

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No. 319

WALTER SCHILLING, PETITIONER,

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 14, 1959

[fol. 1] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM P. ROGERS, Attorney General, Appellant,

v.

WALTER SCHILLING, Appellee.

No. 14723

Appeal from the United Sta District Court for the District of C

JOINT APPENDIX—Filed January 30, 1959

Dallas S. Townsend, Assistant Attorney General, George B. Searls, Irwin A. Seibel, Sharon L. King, Attorneys, Department of Justice, Attorneys for Appellant.

[fol. 3]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOCKET ENTRIES

1784—'58

Action for Judicial Review of Federal Agency Action.

WALTER SCHILLING

v.

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian

Isadore G. Alk, 1026 Woodward Bldg., Dallas S. Townsend, George B. Searls, Victor R. Taylor, Sharon L. King, Attorneys, Department of Justice.

Jury demand

Report Judgment

Date	Account	Received	Disbursed
1958			
July 8	Alk	$10.00	
July 8	U.S. Treasury		$10.00

[fol. 4]

Date	Proceedings
1958	
July 8	Complaint, appearance
July 8	Summons, copies (1) and copies (1) of Complaint issued deft. ser. 7-10-58; U.S. Atty. ser. 7-8-58.
July 17	Motion of deft. to dismiss; P&A c/m 7-17-58; appearance of Dallas S. Townsend, George B. Searls, Victor R. Taylor, Sharon L. King, M.C. 7-17-58.
July 18	Stipulation of counsel extending time for filing P&A in opposition to motion to dismiss to and including 8-18-58 m/n.
Aug. 14	Points and Authorities of pltff. in opposition to deft's motion to dismiss.
Sept. 29	Supplementary memorandum of deft
Sept. 29	Memorandum of pltff. in reply to defts' supplementary memorandum.
Oct. 8	Order denying motion of deft. to dismiss complaint. Curran, J. (N).
Oct. 10	Notice of Appeal by deft; Exhibit; copy mailed to Isadore G. Alk, 1026 Woodward Bldg.
Oct. 10	Motion of deft. to transmit original papers on appeal, "So ordered" Pine, J.
Nov. 6	Order of USCA allowing an appeal on motion to dismiss and that notice of appeal submitted by applicant be filed and record transmitted to USCA by clerk of District Court within forty days.
Nov. 6	Notice of Appeal of deft, per order USCA copy mailed to Isadore C. Alk, 1026 Woodward Bldg.

A true copy:

Test: 11-14-58.

Harry M. Hull, Clerk, By L. McKeever, Deputy Clerk.

[fol. 5]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

1784—58

WALTER SCHILLING, Address: Am Deich 17, Bremen-Borgfeld, Germany, Plaintiff,

v.

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian, Address: Washington, D.C., Defendant.

COMPLAINT FOR JUDICIAL REVIEW OF FEDERAL AGENCY ACTION —Filed July 8, 1958

1. Jurisdiction over the matter here in controversy and the power to act as prayed for herein is vested in this Court by reason of the provisions of Section 10 of the Administrative Procedure Act (60 Stat. 243, Act of June 11, 1946, 5 U.S.C. Sec. 1009), and the Federal Declaratory Judgment Act, as amended August 28, 1954, c. 1033, 68 Stat. 890, 28 U.S.C.A., Sec. 2201.

2. At all the times hereinafter mentioned prior to May 24, 1949, plaintiff was a resident and citizen of Germany, and at all the times hereinafter mentioned since said date plaintiff was and still is a resident and citizen of the Federal Republic of Germany.

3. The defendant, William P. Rogers, is the duly appointed, qualified and acting Attorney General of the United States and as such is successor to the Alien Property Custodian and is charged with the duty of administering property vested pursuant to the Trading With the Enemy Act, as amended, by Executive Order No. 9788 of October 14, 1946, 11 F.R. 11981, and by Reorganization Plan 1, of 1947, Section 101, 12 F.R. 4534.

4. By Vesting Order No. 97, effective August 17, 1942, the then Alien Property Custodian and one of the prede-

cessors in office of the defendant, vested 82 shares of G. Bruning Tobacco Extract Co., Inc., as property of the Estate of Mrs. G. Schilling, deceased, of Bremen, Germany.

[fol. 6] 5. By Vesting Order No. 10203, effective December 8, 1947, the then Alien Property Custodian and one of the predecessors in office of the defendant, vested an obligation of one A. DeWitt Alexander and 570 shares of Pacific Lighting Corporation and accrued dividends thereon as property of plaintiff.

6. By Vesting Order No. 12172, effective October 20, 1948, the then Alien Property Custodian and one of the predecessors in office of the defendant, vested a certain debt of the Lynchburg Trust & Savings Bank, Lynchburg, Virginia, as property of the representatives and heirs of Mrs. G. Schilling, deceased.

7. Prior to and on the dates of the issuance of Vesting Orders Nos. 97 and 12172, plaintiff, as an heir of Mrs. G. Schilling, deceased, was the owner of an interest in the property vested thereby.

8. The property vested by the aforesaid Vesting Orders Nos. 97, 10203 and 12172 has heretofore been liquidated and the sum of $68,537.26 represents the plaintiff's share of the proceeds thereof.

9. Effective on October 15, 1946 by Executive Order No. 9788, the Office of Alien Property Custodian was terminated and all the authority, rights, privileges, powers, duties and functions vested in such Office or in the Alien Property Custodian or transferred or delegated thereto were vested in or transferred or delegated to the Attorney General of the United States to be administered by him or under his direction and control by such officers and agencies of the Department of Justice as he may designate, and the defendant, William P. Rogers, as such Attorney General of the United States is successor to the Alien Property Custodian and is charged with the duty of administering property vested pursuant to the Trading With the Enemy Act, as amended, by said Executive Order No. 9788, 11 F.R. 11981, and by Reorganization Plan 1, of 1947, Section 101, 12 F.R. 4534.

10. On August 8, 1946, the Congress of the United States amended section 32(a)(2)(D) of the Trading With the Enemy Act, 40 Stat. 411, 50 U.S.C. App. Section 1, by providing that a return of vested property may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or [fol. 7] subject, discriminating against political, racial or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation, and provided that such return is in the interest of the United States (Act of August 8, 1946, c. 878, Section 2, 60 Stat. 930).

11. The provisions of Section 32(a)(2)(D) as amended by the Act of August 8, 1946, as aforesaid, do not permit the Alien Property Custodian or the defendant, as Attorney General, any discretion in the determination of the eligibility or qualification of a former owner of vested property for the return of such property or the proceeds thereof, but only permits the Alien Property Custodian and the defendant, as Attorney General, discretion in making a return of vested property to the former owner thereof once the eligibility or qualification of such former owner has first been affirmatively determined.

12. Plaintiff was denied admission to the practice of law, which was a substantial deprivation of his rights as a German citizen, because he was a known opponent of Nazism and considered politically unreliable, and Anti-Nazis or Non-Nazis such as plaintiff were recognized and treated as a political group by Nazi authorities and under Nazi laws.

13. On or about July 26, 1948, plaintiff deeming himself eligible and qualified for a return of vested property under said Section 32(a)(2)(D) duly filed with the then Alien Property Custodian his Notice of Claim in such form and containing such particulars as by the then Alien Property Custodian and by law required, praying for the release and return of his interest in the property vested pursuant to the aforesaid Vesting Orders Nos. 97, 10203, and 12172.

14. Thereafter a hearing was conducted in accordance with the Rules of Procedure for Claims of the Office of Alien Property (8 CFR Part 502) before Harry R. Hinkes, Hearing Examiner, in the Office of Alien Property and the question presented at said hearing was whether the plaintiff was eligible for a return of the vested property under said Section 32(a)(2)(D) as a person who failed to enjoy full rights of German citizenship throughout the period of hostilities as a result of German laws, decrees or regu- [fol. 8] lations discriminating against political, racial or religious groups.

15. Thereafter and on May 31, 1957, the Hearing Examiner rendered his decision concluding that plaintiff failed to enjoy full rights of German citizenship during the period of hostilities as a consequence of German laws, decrees or regulations discriminating against a political group, i.e., those who rejected an invitation to join the Nazi Party and that plaintiff is eligible for the return of vested property under said Section 32, and recommending to the Director, Office of Alien Property, that plaintiff's claim be allowed.

16. On April 2, 1958, the Director, Office of Alien Property, rejected the Hearing Examiner's aforesaid recommendation, determined that plaintiff was not a member of a political group that was discriminated against and concluded that plaintiff does not qualify for return of the vested property under said Section 32 and accordingly disallowed plaintiff's claim.

17. The decision of the Director, Office of Alien Property, misconceived and was not in accordance with and short of the applicable law and was illegal and erroneous in that there was no legal substantial evidence on the record as a whole to support said decision, and was unreasonable, arbitrary and capricious and in express disregard of the object and purpose of Congress to make eligible for the return of vested property those former owners who failed to enjoy full rights of citizenship throughout the period of hostilities as a result of laws of their governments discriminating against political groups.

18. Thereafter and in accordance with Section 502.23 of the Rules of Procedure for Claims of the Office of Alien Property, a copy of the decision of the Director, Office of Alien Property, the record before the Hearing Examiner, and the exceptions and briefs filed with the Director were transmitted by him to the defendant, as Attorney General.

19. On or about April 10, 1958, the defendant, as Attorney General, determined not to undertake a review of the decision of the Director, Office of Alien Property, disallowing plaintiff's claim, and thereupon the decision of the Director, Office of Alien Property, became final and plaintiff has exhausted his administrative remedies.

[fol. 9] 20. The refusal of the defendant, as Attorney General, to undertake a review of the decision of the Director, Office of Alien Property, rejecting the Hearing Examiner's recommendations and disallowing plaintiff's claim is not only a serious injury to plaintiff but has created an actual controversy between plaintiff and the defendant as to plaintiff's eligibility and qualification for a return of plaintiff's share in the vested property under Section 32(a)(2)(D) of the Trading With the Enemy Act.

21. Should the decision of the Director, Office of Alien Property, which the defendant, as Attorney General, refused to review and for whom the Director, Office of Alien Property, was authorized to, and did, act in such decision, be and remain final and should this Court fail to grant the relief as prayed for herein, the purposes of Congress as expressed in said Section 32(a)(2)(D) will be circumvented and destroyed.

22. No Federal Statute precludes judicial review of the aforesaid Agency action.

Wherefore, the plaintiff respectfully prays that this Court:

(1) Review the decision of the Director, Office of Alien Property, disallowing plaintiff's claim and the action of the defendant, as Attorney General, in sustaining said decision;

(2) Adjudge and declare that plaintiff is eligible and does qualify for the return of his share of the vested property;

(3) Hold unlawful and reverse and set aside the decision of the Director, Office of Alien Property, disallowing plaintiff's claim;

(4) Direct the defendant, as Attorney General, to determine whether or not a return to the plaintiff of his share in the vested property is in the interest of the United States;

(5) Award plaintiff such other and further relief in the premises as to the Court may seem just in the premises; and

[fol. 10] (6) Award costs.

Dated July 8, 1958.

Isadore G. Alk, 1026 Woodward Building, Washington 5, D.C., Henry I. Fillman, 120 Broadway, New York 5, New York, Attorneys for Plaintiff

Katz & Sommerich, 120 Broadway, New York 5, New York, Of Counsel.

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1784—58

[Title omitted]

MOTION TO DISMISS—Filed July 17, 1958

The defendant moves to dismiss the complaint on the grounds that the Court does not have jurisdiction of the claim or cause of action stated therein, because such claim or cause of action is based on Section 32 of the Trading with the Enemy Act, and administrative action under said Section is not subject to judicial review or control.

Dallas S. Townsend, Assistant Attorney General, Director, Office of Alien Property; George B. Searls, Victor R. Taylor, Sharon L. King, Attorneys, Department of Justice, Washington, D.C., Attorneys for Defendant.

[fol. 11]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1784—58

[Title omitted]

ORDER DENYING MOTION TO DISMISS—October 8, 1958

This cause came on to be heard on the defendant's motion to dismiss the complaint and was argued by counsel, and due consideration thereof having been had, it is hereby

Ordered, adjudged, and decreed, that said motion to dismiss be and hereby is denied.

And the Court is of opinion that this Order involves a question of law, as to the jurisdiction of the Court to review a decision by the Director of the Office of Alien Property (and the Attorney General) that a claimant is not eligible for a return of property under Section 32 of the Trading with the Enemy Act, which is controlling in this cause, that there is substantial ground for difference of opinion thereon, and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation.

Edward M. Curran, United States District Judge.

October 8, 1958.

[fol. 12]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1784—58

[Title omitted]

NOTICE OF APPEAL—Filed October 10, 1958

Notice is hereby given that defendant, William P. Rogers, Attorney General of the United States, and Successor to the Alien Property Custodian hereby appeals to the United States Court of Appeals for the District of Columbia Cir-

cuit from the order of this Court entered on October 8, 1958 in favor of plaintiff against said defendant denying defendant's motion to dismiss. Attached hereto is a copy of defendant's petition for leave to appeal filed this day in the United States Court of Appeals for the District of Columbia Circuit.

Dated: October 10, 1958.

Dallas S. Townsend, Assistant Attorney General; George B. Searls, Victor R. Taylor, Sharon L. King, Attorneys, Department of Justice, Washington 25, D.C., Attorneys for Defendant.

To: Isadore C. Alk, 1026 Woodward Building, Washington 5, D.C.

[fol. 12A]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958, District Court
Civil Action No. 1784—58

No. 14723

WILLIAM P. ROGERS, Attorney General, Applicant,

v.

WALTER SCHILLING, Respondent.

Before Wilbur K. Miller, Bazelon and Burger, Circuit Judges, in Chambers.

ORDER ALLOWING APPEAL—November 3, 1958

Upon consideration of the application for an appeal from an interlocutory order of the District Court, and it appearing that respondent consents, it is

Ordered by the court that an appeal from the order of the District Court entered herein October 8, 1958, denying the motion to dismiss, is hereby allowed.

It is further ordered by the court that the notice of appeal submitted by the applicant to the District Court be filed and that the record on appeal be transmitted to this court by the clerk of the District Court within forty days.

Per Curiam.

Dated November 3, 1958.

[fol. 12B]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1784—58

WALTER SCHILLING, Plaintiff,

v.

WILLIAM P. ROGERS, Attorney General, Defendant.

NOTICE OF APPEAL—Filed November 6, 1958

The United States Court of Appeals for the District of Columbia Circuit having granted on November 3, 1958, defendant's petition for leave to appeal, the said defendant, William P. Rogers, Attorney General of the United States and Successor to the Alien Property Custodian, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order of this Court entered on October 8, 1958 in favor of plaintiff against defendant denying defendant's motion to dismiss.

Dated: November 6, 1958.

Dallas S. Townsend, Assistant Attorney General; George B. Searls, Victor B. Taylor, Sharon L. King, Attorneys, Department of Justice, Washington 25, D.C., Attorneys for Defendant.

To: Isadore C. Alk, 1026 Woodward Building, Washington 5, D.C.

[fol. 31] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,723

WILLIAM P. ROGERS, Attorney General of the United States, Appellant,

v.

WALTER SCHILLING, Appellee.

Appeal from the United States District Court for the District of Columbia

---

Mr. George B. Searls, Attorney, Department of Justice, with whom Mr. Irwin A. Seibel and Miss Sharon L. King, Attorneys, Department of Justice, were on the brief, for appellant. Mr. Victor R. Taylor, Attorney, Department of Justice, also entered an appearance for appellant.

Mr. Henry I. Fillman of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, with whom Messrs. Isadore G. Alk and Otto C. Sommerich were on the brief, for appellee.

OPINION—Decided May 21, 1959

Before Edgerton, Fahy and Washington, Circuit Judges.

Per Curiam: This is an alien property case. Plaintiff-appellee, a German national, applied to the Attorney Gen- [fol. 32] eral for relief under Section 32 of the Trading With the Enemy Act,[1] claiming to be a persecuted person within the scope of the first proviso of Section 32(a)(2)

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[1] Added by 60 Stat. 50 (1946), as amended, 50 U.S.C. App. § 32 (1952), as amended, 50 U.S.C. App. § 32 (Supp. V, 1958).

(D).[2] The Attorney General, after hearing, found that plaintiff was not within the class intended to be benefited by that proviso, and refused to return plaintiff's vested property. Plaintiff then brought suit in the District Court, praying an adjudication of eligibility under the proviso. The Government moved to dismiss, and the District Court denied the motion. An interlocutory appeal was allowed under the provisions of 28 U.S.C.A. § 1292(b) (Supp. 1958).

Though this is not a direct attempt to compel the return of vested alien property, it is an effort to obtain judicial determination of a preliminary issue of a sort committed by Congress to agency discretion. As such, it is forbidden by Section 7(c) of the Act, and reliance cannot be placed on other legislation having no specific application to alien property, such as the Declaratory Judgment Act[3] and the Administrative Procedure Act.[4] See *McGrath* v. *Zander*, 85 U.S. App. D.C. 334, 177 F. 2d 649 (1949); [fol. 33] *Legerlotz* v. *Rogers*, —— U.S. App. D.C. ——, —— F. 2d —— (1959), and cases there cited. The complaint must be dismissed for lack of jurisdiction.

Remanded.

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[2] . . . *Provided*, That notwithstanding the provisions of this subdivision return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation . . ."

[3] 28 U.S.C.A. § 2201 (Supp. 1958).

[4] 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-09 (1952).

[fol. 34] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,723

C. A. 1784-58

WILLIAM P. ROGERS, Attorney General of the United States, Appellant,

v.

WALTER SCHILLING, Appellee.

Appeal from the United States District Court for the District of Columbia

Before Edgerton, Fahy and Washington, Circuit Judges.

JUDGMENT—May 21, 1959

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the complaint for lack of jurisdiction.

Per Curiam.

Dated: May 21, 1959.

[fol. 36] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 37]

SUPREME COURT OF THE UNITED STATES

No. 319, October Term, 1959

WALTER SCHILLING, Petitioner,

vs.

WILLIAM P. ROGERS, Attorney General.

ORDER ALLOWING CERTIORARI—October 26, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary calendar and set for argument immediately preceding No. 213.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING,

Petitioner,

WILLIAM P. ROGERS, Attorney General,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISADORE G. ALK,
1026 Woodward Building,
Washington 5, D. C.

HENRY I. FILLMAN,
OTTO C. SOMMERICH,
120 Broadway,
New York 5, N. Y.

Attorneys for Petitioner

INDEX

CASES CITED

STATUTES CITED

MISCELLANEOUS CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

WALTER SCHILLING,

Petitioner,

v.

WILLIAM P. ROGERS, Attorney General.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Walter Schilling, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the judgment of that court made and entered in this case on May 21, 1959 which reversed an order of the District Court for the District of Columbia denying the Attorney General's motion to dismiss the complaint and remanded the case with directions to dismiss the complaint for lack of jurisdiction (R. 34).

Opinion Below

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 31) has not yet been reported. A copy thereof is set forth in the Appendix, *infra*, page 20. The District Court rendered no opinion.

Jurisdiction

The date of the judgment of the Court of Appeals for the District of Columbia Circuit sought to be reviewed is May 21, 1959, and said judgment was entered on May 21, 1959. A copy thereof is appended hereto in the Appendix, *infra*, page 22.

The Act of June 25, 1948 c. 646, 62 Stat. 928, 28 U.S.C. § 1254(1), 28 U.S.C.A. § 1254(1), confers on this Court jurisdiction to review said judgment of the Court of Appeals for the District of Columbia Circuit by writ of certiorari.

Questions Presented

1. Whether the charge in the complaint, which is admitted by the Attorney General's motion to dismiss, that the decision of the Director of the Office of Alien Property (and the Attorney General) finding that the petitioner, a "technical" enemy during World War II, is ineligible to be considered for return of vested property under §§ 32(a)(2)(D) and 32(a)(5) of the Trading with the Enemy Act was illegal, without substantial evidence on the record to support it, arbitrary and capricious, presents a justiciable controversy within the jurisdiction of the District Court for the District of Columbia.

2. Whether the District Court for the District of Columbia has jurisdiction under the Declaratory Judgment Act, the Administrative Procedure Act, or under the grant of federal-question jurisdiction to the District Courts of a suit to review and set aside a decision of the Director of the Office of Alien Property (and the Attorney General) finding that the petitioner does not qualify under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act for return of vested property, which decision is admitted by the Attorney General's motion to dismiss to be

illegal, without substantial evidence on the record to support it, arbitrary and capricious.

3. Whether the petitioner's suit in the District Court to review and set aside the decision of the Director of the Office of Alien Property (and the Attorney General) finding that petitioner is not within a class of persons eligible for return of vested property under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act is forbidden by the fourth paragraph of § 7(c) of said Act which provides that the "sole relief and remedy" of any person having any claim to vested property "shall be that provided by the terms of this Act."

The Statutes Involved

The statutes which the case involves are

(1) the Trading with the Enemy Act, approved October 6, 1917, 40 Stat. 411, as amended, 50 U.S.C. App. § 1 *et seq.*, 50 U.S.C.A. App. § 1 *et seq.*, particularly § 2, 40 Stat. 411, the fourth paragraph of § 7(c) which was added thereto by the Act of November 4, 1918 c. 201, 40 Stat. 1020, § 9(a), 40 Stat. 419, § 32, added thereto by the Act of March 8, 1946, c. 83, 60 Stat. 50 and as amended by the Act of August 8, 1946, c. 878, § 2, 60 Stat. 930, and § 39, which was added thereto by the Act of July 3, 1948, c. 826, § 12, 62 Stat. 1246;

(2) the Declaratory Judgment Act, as amended August 28, 1954, c. 1033, 68 Stat. 890, 28 U.S.C. § 2201 (Supp. V), 28 U.S.C.A. § 2201;

(3) Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009, 5 U.S.C.A. § 1009; and

(4) Act of June 25, 1948, c. 646, 62 Stat. 930, 28 U.S.C. § 1331, 28 U.S.C.A. § 1331, in effect at the

time of the commencement of petitioner's suit on July 8, 1958 and prior to July 25, 1958, when Section 1, Public Law 85-554, 72 Stat. 415, which increased the requisite jurisdictional amount, was approved.

The relevant provisions of the statutes are set forth in the Appendix, *infra*, pages 23-30.

Statement of the Case

The action was brought to review a decision of the Director of the Office of Alien Property (and the Attorney General) that petitioner is not eligible to receive a return of vested property under § 32(a)(2)(D) of the Trading with the Enemy Act.

The jurisdiction of the District Court was invoked under § 10 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. § 1009, 5 U.S.C.A. § 1009, and the Federal Declaratory Judgment Act, as amended August 28, 1954, c. 1033, 68 Stat. 890, 28 U.S.C. § 2201, 28 U.S.C.A. § 2201 (R. 5).

The complaint (R. 5) alleges, in substance, the following:

Petitioner has always been a resident and citizen of Germany. By three vesting orders, effective respectively August 17, 1942, December 8, 1947 and October 20, 1948, the then Alien Property Custodian seized certain property in which petitioner had an interest. The vested property has been liquidated and $68,537.26 represents petitioner's share of the proceeds.

On August 8, 1946, Congress amended § 32(a)(2)(D) by providing that vested property may be returned to an individual who, although a citizen and resident of Germany during World War II, did not enjoy full rights of German citizenship as a consequence of a German law, decree or regulation discriminating against political, racial or religious groups, and such return is also determined to

be in the interest of the United States as required by § 32(a)(5).

The provisions of § 32(a)(2)(D), as so amended, do not permit the Alien Property Custodian or the Attorney General, who is charged with the duty of administering vested property, any discretion in determining eligibility for return of such property, but only permit discretion in making a return to the former owner once eligibility or qualification has first been affirmatively established (R. 7).

Petitioner was denied admission to the practice of law, which was a substantial deprivation of his rights as a German citizen, because he was a known opponent of Nazism and considered politically unreliable, and Anti-Nazis or Non-Nazis such as petitioner were recognized and treated as a political group by Nazi authorities and under Nazi laws (R. 7).

On or about July 26, 1948, deeming himself eligible and qualified for return of vested property under § 32(a)(2)(D) petitioner filed his claim for return; that thereafter a hearing was conducted in the Office of Alien Property before a Hearing Examiner, and the question presented at the hearing was whether petitioner was eligible for return of vested property under § 32(a)(2)(D).

The Hearing Examiner rendered a decision concluding that petitioner was eligible for the return of vested property because he failed to enjoy full rights of German citizenship during the period of hostilities as a consequence of German laws, decrees or regulations discriminating against a political group and recommended allowance of the claim (R. 8). (A copy of the decision is appended hereto in the Appendix, *infra*, p. 31.)

The Director of the Office of Alien Property rejected the Hearing Examiner's recommendation, determined that petitioner was not a member of a "political group" that was discriminated against within the meaning of § 32(a)

(2)(D), and concluded that he was ineligible for return of the vested property. He accordingly disallowed the claim (R. 8). (A copy of the Director's decision is appended hereto in the Appendix, *infra*, p. 40.) The Attorney General decided not to review and thereupon the Director's decision became final administratively (R. 8).

The complaint specifically alleges in paragraph 17 (R. 8) that the Director's decision

> "misconceived and was not in accordance with and short of the applicable law and was illegal and erroneous in that there was no legal substantial evidence on the record as a whole to support said decision, and was unreasonable, arbitrary and capricious and in express disregard of the object and purpose of Congress to make eligible for the return of vested property those former owners who failed to enjoy full rights of citizenship throughout the period of hostilities as a result of laws of their governments discriminating against political groups."

It is further alleged that petitioner has exhausted his administrative remedy, that there is an actual controversy between him and the Attorney General as to petitioner's eligibility for a return under § 32(a)(2)(D), that should the Director's decision remain final the purpose of Congress as expressed in said section will be circumvented and destroyed and that no statute precludes judiciai review of the decision (R. 8, 9).

The complaint sought a decree setting aside the Director's decision as unlawful, adjudging that petitioner is eligible for the return of his vested property, and directing the Attorney General to determine whether or not a return of the property to petitioner is in the interest of the United States (R. 9).

The Attorney General moved to dismiss the complaint on the ground that the District Court does not have juris-

diction to review administrative action under § 32 (R. 10). The District Court denied the motion (R. 11). An interlocutory appeal was allowed under the provisions of Public Law No. 85-919, approved September 2, 1958, 72 Stat. 1770, 28 U.S.C. § 1292(b), 28 U.S.C.A. § 1292(b) (R. 12a).

Reasons Relied On for the Allowance of the Writ

1. The questions presented are of fundamental importance to the proper administration of § 32 of the Trading with the Enemy Act.

John Ward Cutler, associate general counsel, Office of Alien Property Custodian, who testified on July 1, 1946, before the Subcommittee of the Committee on the Judiciary of the United States Senate, 79th Cong., 2d Sess., which then had before it S. 2039, to amend §32(a), and S. 2378, to amend the First War Powers Act, 1941, 55 Stat. 838, pointed out to the Subcommittee (Hearings p. 12) that it was intended by the proposed amendment to release vested property "in the case of victims of Axis oppression who were deprived of life or civil rights by discriminatory legislation against *political*, racial, or religious *groups* in the country * * * of which they were nationals", and that it was intended by the proposed amendment to release vested property where the former owner thereof "opposed the Nazi cause" and was, in fact, persecuted by the Germans, but that by the proposed amendment "there will be no return to anybody who was in fact in favor of the Nazi cause". (Emphasis supplied)

In Senate Report No. 600, 82d Cong., 1st Sess. (1951) on S. 1748 the purpose of the first proviso of § 32(a)(2)(D) is expressed in the following language (at p. 2):

> "On August 8, 1946, the Congress of the United States, by enactment of an amendment to section 32(a)(2) of the Trading With the Enemy Act, sought to provide for the release of property vested in the Alien

Property Custodian, where it was apparent that the former owner of the assets was an individual who 'was deprived of life or substantially deprived of liberty pursuant to any law, decree or regulation • • • discriminating against political, racial, or religious groups • • •', in an enemy country.

"By this amendment a necessary and clear-cut distinction was effected between the property of those individuals who were in fact our enemies in the last war, and those who by their extreme persecution at the hands of their governments were the 'enemies of our enemies' and our own allies."

The same statement is found on page 1 of Senate Report No. 784, 81st Cong., 1st Sess., on S. 603 (1949), which contains the following (at p. 4):

"The general approach incorporated in this proposed legislation represents also the only humanitarian one and the only realistic one possible in view of the extraordinary experiences of these persecuted groups over the last 15 years and the extraordinary present-day needs of the survivors. *These victims of persecution*, it should be remembered, *were treated as a group or 'community'* • • •. Indeed, their property was taken by the United States because they were part of a large political group (i.e., enemy nationals). *To refuse to treat them as a group or community when* there is a possibility of their receiving aid and to emphasize their individuality only when it becomes a barrier to receiving a benefit *is an injustice which the Government of the United States should be avid to avoid.*" (Emphasis supplied)

The Deputy Director of the Office of Alien Property has stated that:

". . . Under [section 32] . . . enemy citizens who had been persecuted for political, racial or religious

reasons could have their former property returned to them." (Hearings before the Subcommittee to Investigate the Administration of the Trading with the Enemy Act of the Senate Committee on the Judiciary, 83rd Cong., 1st Sess., p. 104.)

If a decision of ineligibility for return under the first proviso of § 32(a)(2)(D) made by the Director and the Attorney General illegally, without substantial evidence to support it and otherwise arbitrary or capricious, is immune from judicial review, then the Director and the Attorney General in the administration of claims under § 32 are in a position to nullify the Congressional intent in enacting the first proviso of § 32(a)(2)(D). Indeed, the Attorney General recognizes the great importance of the questions presented, for in his application to the Court of Appeals for permission to appeal from the order of the District Court, the Attorney General stated as follows (R. 17, 18):

"The question of jurisdiction to review administrative decisions under Section 32 is of great importance to the administration of the Trading With the Enemy Act. A granting of the application and an early disposition of the appeal will advise the Attorney General as to his authority over claims still pending in the Office of Alien Property for the return of property under Section 32, some 4,000 in number, and will also advise him as to the chances of additional litigation. "Since Section 32 was added to the Act in 1946, approximately 12,000 claims for the return of property have been disposed of administratively, the great majority under Section 32. • • • Under the Regulations claims may be disposed of in summary proceedings or after hearings. Thousands of claims have been dismissed or disallowed for the reason that the claimant was held to be ineligible under the provisions of Section 32 for return. Hundreds of claims have drawn in question the construction and application of the

> 'persecution' provisions of Section 32(a)(2)(D), which are the basis for the present suit, * * *."

Manifestly, a determination of the questions presented for review will advise the Director and the Attorney General whether arbitrary and capricious determinations of ineligibility for return under § 32 are immune from judicial review and thereby guide them in the determination of a large body of similar claims now pending.

2. The Court of Appeals has decided important questions of federal law involving the construction of federal statutes which have not been, but should be, authoritatively settled by this Court.

§ 10 of the Administrative Procedure Act, which was enacted on June 11, 1946, provides that, except so far as statutes preclude judicial review, or agency action is by law committed to agency discretion, any person "suffering legal wrong" because of any agency action shall be entitled to judicial review thereof.

The report of the Senate Judiciary Committee on the Act, S. Rep. No. 752, 79th Cong., 1st Sess., reprinted in S. Doc. No. 248, 79th Cong. 2d Sess., at page 185, defines "legal wrong," as used in § 10(a), in the following language, at page 212:

> "* * * The phrase 'legal wrong' means such a wrong as is specified in subsection (e) of this section."

The report of the House Judiciary Committee, H. Rep. No. 1980, 79th Cong., 2d Sess., 233, reprinted in S. Doc. No. 248, 79th Cong., 2d Sess., in referring to § 10(a), states:

> "* * * The phrase 'legal wrong' means such a wrong as is specified in Section 10(e)."

§ 10(e) specifies as unlawful any agency action, findings or conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or unsupported by substantial evidence.

When the bill which became the Administrative Procedure Act was under consideration in the Senate on March 12, 1946, the following colloquy took place between Senators Donnell and Austin and Senator McCarran, one of the sponsors of the bill, who was explaining its provisions on behalf of the Senate Judiciary Committee (S. Doc. No. 249, *supra*, pp. 310-311):

"Mr. Donnell (referring to § 10)—

"It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?

"Mr. McCarran. Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.

* * * * *

"Mr. Donnell. But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims that there has been an abuse of that discretion. Is that correct?

"Mr. McCarran: It must not mean arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning.

"Mr. Austin. And is it not also true that, because of the situation in which we are at this moment, this

bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?

"Mr. McCarran. That is true; the Senator is entirely correct in his statement."

Manifestly, in the context of the legislative history of the Act, any agency action which is illegal, unsupported by substantial evidence, arbitrary and capricious, is a "legal wrong."

Indeed, a statement of the Attorney General appended to the Senate Report as Appendix B, reprinted in S. Doc. No. 248, *supra*, page 230, states that any person "suffering legal wrong because of any agency action • • • shall be "entitled to judicial review of such action", and that this "reflects existing law", referring to the *Chicago Junction Case*, 264 U. S. 258, as a case having an important bearing on this subject.

In view of the Attorney General's admission by the motion to dismiss of the charge in the complaint that the determination of the Director of the Office of Alien Property that the petitioner is ineligible to be considered for return of vested property was illegal, arbitrary and capricious, and without substantial evidence on the record as a whole to support it, it is clear that the Attorney General concedes that the petitioner has suffered a "legal wrong" thereby within the meaning of Section 10(a) of the Act.

Thus, the Act clearly authorizes judicial review as to the validity of the Director's decision, and Section 10(b) of the Act authorizes such review by an action for a declaratory judgment. Whether the Director applied the legislative standard for eligibility for return of vested property set forth in the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act, whether he acted within the authority conferred, whether there was sub-

stantial evidence to support his decision and whether the decision is arbitrary or capricious or otherwise not in accordance with applicable law, are questions for judicial decision, especially where, as here, the findings of the Hearing Examiner and the Director as to the petitioner's eligibility for return are in conflict. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474; In re *United Corporation*, 249 F. 2d 168 (C. A. 3). See, also, *Estep* v. *United States*, 327 U. S. 114; *Stark* v. *Wickard*, 321 U. S. 288; *Federal Radio Commission* v. *Nelson Bros., B. & M. Co.*, 289 U. S. 266, 276-277; *Fleming* v. *Moberly Milk Products Co.*, 82 U. S. App. D. C. 16, 160 F. 2d 259, 265.

In discussing the Administrative Procedure Act, Mr. Justice Jackson, in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 40-41, said:

> "The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities.
>
> "Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear."

Under §§ 32(a)(2)(D) and 32(a)(5) of the Trading with the Enemy Act, vested property may be returned to an individual who, although a citizen and resident of Germany during World War II, did not enjoy full rights of citizenship under a law, decree or regulation of Germany discriminating against political groups, whenever such return is in the interests of the United States. Thus, the authority to exercise discretion as to whether a return of vested property to the former German owner is in the

interests of the United States, depends upon such individual's status as a person eligible for return.

Manifestly, there are two stages in the administrative process under § 32 of the Trading with the Enemy Act. The first stage is one whereby the Director must make a determination as to whether a claimant comes within a class of persons eligible for return under the first proviso of § 32(a)(2)(D). The second stage is one whereby, after having first determined that a claimant is eligible, the Director must determine under § 32(a)(5) whether a return of the vested property to the claimant is in the interest of the United States. The first stage is not discretionary. The second stage is discretionary. However, the Court of Appeals was of the opinion that the first stage is "committed by Congress to agency discretion".

Assuming for the discussion, but without conceding, that the first stage of determining that a claimant comes within a class of persons made eligible by the first proviso of § 32(a)(2)(D) is discretionary, § 10(e) of the Administrative Procedure Act makes manifest that a determination of non-eligibility for return is reviewable for it is there provided that agency action may be held unlawful and be set aside if not only arbitrary, capricious and without substantial evidence to support it, but also for "an abuse of discretion or otherwise not in accordance with law."

Furthermore, the terms of § 32 of the Trading with the Enemy Act do not clearly, convincingly and unmistakably express an intent to preclude judicial review of the Director's decision and, therefore, judicial review under the Administrative Procedure Act is not precluded by the first exception of § 10 of that Act.

In the report of the Senate Judiciary Committee, S. Rep. No. 752, 79th Cong., 1st Sess., reprinted in S. Doc. No. 248, 79th Cong., 2d Sess., at page 212, the following is found with respect to § 10 of the Administrative Procedure Act:

> "Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent

the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board."

The same statements appear in H. Rep. No. 1980, 79th Cong., 2d Sess., reprinted in S. Doc. No. 248, *supra*, at page 275. This report then states the following:

"* * * To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review."

Congressman Walter, one of the House sponsors of the Act, in explaining its various provisions, said on the floor of the House on May 24, 1946 (S. Doc. 248, *supra*, at p. 368):

"Two general exceptions are made in the introductory clause of section 10. The first exempts all matters so far as statutes preclude judicial review. Congress has rarely done so. Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial—see *Stark* v. *Wickard* (321 U. S. 288 at p. 317).

"The second general limitation on the section is that there are exempted matters to the extent that they are by law committed to the absolute discretion of administrative agencies. There have been much misunderstanding and confusion of terms respecting the discretion of agencies. They do not have authority in any case to act blindly or arbitrarily. They may not wilfully act or refuse to act. Although like trial

courts they may determine facts in the first instance and determine conflicting evidence, they cannot act in disregard of or contrary to the evidence or without evidence. They may not take affirmative or negative action without the factual basis required by the laws under which they are proceeding. Of course, they may not proceed in disregard of the Constitution, statutes or other limitations recognized by law."

Since the Act of August 8, 1946, c. 878, § 2, 60 Stat. 930, which added the first proviso to § 32(a)(2)(D) of the Trading with the Enemy Act, was enacted some two months after the Administrative Procedure Act became law, the failure of Congress to provide explicitly in § 32 that agency action thereunder should not be reviewed in any court is a clear indication that Congress did not intend to exclude judicial review of agency action under § 32(a)(2)(D) which is not in accordance with the applicable law, is not supported by substantial evidence, and is unreasonable, arbitrary and capricious.

Notwithstanding the foregoing, the Court of Appeals held that judicial review of the decision of the Director (and the Attorney General) that petitioner is not within a class of persons eligible for return of vested property under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act is forbidden by the fourth paragraph of § 7(c) of said Act, which provides that "the sole relief and remedy" of any person having any claim to vested property "shall be that provided by the terms of this Act" and, therefore, the decision is not reviewable under the Administrative Procedure Act and the Declaratory Judgment Act.

But the Court of Appeals failed to recognize that § 7(c) refers only to the remedy provided by § 9(a) of the Trading with the Enemy Act, which authorizes a suit to recover vested property by non-enemies and, since this is not a suit to recover vested property, § 7(c) does not preclude judicial review of the finding and decision with respect to

the *status* of petitioner, a "technical" enemy who is ineligible to bring suit under § 9(a), as a person eligible under § 32(a)(2)(D) to be considered for return in accordance with § 32(a)(5).

Moreover, the Court of Appeals overlooked that, although the words "relief and remedy" in § 7(c) signify a means of redressing a wrong, the Trading with the Enemy Act does not afford petitioner a remedy to review the Director's illegal, arbitrary or capricious action, and gave no consideration to § 10(c) of the Administrative Procedure Act which provides that

> "Every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

Since petitioner is a "technical" enemy, he has no remedy under § 9(a) of the Trading with the Enemy Act, which may be availed of only by non-enemies, and, since no adequate remedy is afforded him under the Trading with the Enemy Act to review the Director's determination that he is not eligible under § 32(a)(2)(D) to receive a return of his vested property, it is clear that § 10(c) of the Administrative Procedure Act affords him a judicial review of such determination.

3. The Court of Appeals had decided federal questions in a way in conflict with applicable decisions of this Court.

The decisions of this Court in *Leedom* v. *Kyne*, 358 U. S. 184, 190; *Harmon* v. *Brucker*, 355 U. S. 579, 581-582; *Stark* v. *Wickard*, 321 U. S. 288, 310, and *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 277, seem to have been ignored by the Court of Appeals. They sustain the jurisdiction of a federal court to review the decision of a Government agency which is illegal, unsupported by substantial evidence, arbitrary or capricious, or otherwise in excess of delegated powers.

The Attorney General by the motion to dismiss admitted the charge in the complaint that the Director's determina-

tion was illegal, unsupported by substantial evidence on the record as a whole to support it, arbitrary and capricious (*The Chicago Junction Case*, 264 U. S. 258, 262, 265). This admission presents a justiciable controversy within the jurisdiction of the District Court. (*United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 429, 431; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.

The decisions in these cases should have required the Court of Appeals to hold that the District Court has jurisdiction of the suit.

The decisions of this Court in *Perkins* v. *Elg*, 307 U. S. 325 and *McGrath* v. *Kristensen*, 340 U. S. 162, also seem to have been ignored by the Court of Appeals. They are authority for the proposition stated by Mr. Justice Reed in *Kristensen*, as follows (p. 169):

> "Where an official's authority to act depends upon the status of the person affected, in this case eligibility for citizenship, that status, when in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies.
>
> * * * * * *
>
> "* * * As such a controversy over federal laws, it is within the jurisdiction of federal courts, 28 U.S.C. § 1331, 28 U.S.C.A. § 1331, and the terms of the Declaratory Judgment Act, 28 U.S.C. § 2201, 28 U.S.C.A. § 2201."

These decisions should have required the Court of Appeals to hold that this case presents an actual controversy over federal law which is within the jurisdiction of the District Court and may be determined by a declaratory judgment, for here, too, the Director's authority under § 32(a) of the Trading with the Enemy Act, to return vested property "depends upon the status of" the petitioner, namely, "eligibility" for return.

Furthermore, in resting its decision on § 7(c) of the Trading with the Enemy Act, the Court of Appeals dis-

regarded the decisions of this Court in *Becker Steel Co. of America* v. *Cummings*, 296 U. S. 74; *Central Union Trust Co.* v. *Garvin*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239, 245-246; *Guessefeldt* v. *McGrath*, 342 U. S. 308, 318, and *Societe Internationale, etc.* v. *Rogers*, 357 U. S. 197, 211.

These decisions and the provision of § 7(c) that the "sole relief and remedy" of any person having any claim to vested property "shall be that provided by the terms of this Act" relate to property whose seizure and ultimate retention was not authorized by the Act and for whose recovery by a non-enemy an express statutory remedy was provided by § 9(a) of the Act. Nothing in them appears to preclude a person, ineligible under § 9(a) to sue for the recovery of vested property because he is an enemy, but eligible for the return of such property under the first proviso of § 32(a)(2)(D), from seeking judicial review of an admittedly illegal, arbitrary or capricious administrative determination of ineligibility under the first proviso of § 32(a)(2)(D) and for which no other remedy is available under the Trading with the Enemy Act.

4. In view of the foregoing, review by this Court of the judgment of the Court of Appeals would be in the interest of the law and in its exposition and enforcement.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix.

1. Opinion of the Court of Appeals for the District of Columbia Circuit.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,723

WILLIAM P. ROGERS,
Attorney General of the United States,
Appellant,

v.

WALTER SCHILLING,
Appellee.

Appeal from the United States District Court
for the District of Columbia

Decided May 21, 1959

Mr. George B. Searls, Attorney, Department of Justice, with whom *Mr. Irwin A. Seibel* and *Miss Sharon L. King,* Attorneys, Department of Justice, were on the brief, for appellant. *Mr. Victor R. Taylor,* Attorney, Department of Justice, also entered an appearance for appellant.

Mr. Henry I. Fillman of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom *Messrs. Isadore G. Alk* and *Otto C. Sommerich* were on the brief, for appellee.

Before EDGERTON, FAHY and WASHINGTON, Circuit Judges.

PER CURIAM: This is an alien property case. Plaintiff-appellee, a German national, applied to the Attorney

Appendix

General for relief under Section 32 of the Trading With the Enemy Act,[1] claiming to be a persecuted person within the scope of the first proviso of Section 32(a)(2)(D).[2] The Attorney General, after hearing, found that plaintiff was not within the class intended to be benefited by that proviso, and refused to return plaintiff's vested property. Plaintiff then brought suit in the District Court, praying an adjudication of eligibility under the proviso. The Government moved to dismiss, and the District Court denied the motion. An interlocutory appeal was allowed under the provisions of 28 U.S.C.A. § 1292(b) (Supp. 1958).

Though this is not a direct attempt to compel the return of vested alien property, it is an effort to obtain judicial determination of a preliminary issue of a sort committed by Congress to agency discretion. As such, it is forbidden by Section 7(c) of the Act, and reliance cannot be placed on other legislation having no specific application to alien property, such as the Declaratory Judgment Act[3] and the Administrative Procedure Act.[4] See *McGrath* v. *Zander*, 85 U. S. App. D. C. 334, 177 F. 2d 649 (1949); *Legerlotz* v. *Rogers*, —— U. S. App. D. C. ——, ——F. 2d —— (1959), and cases there cited. The complaint must be dismissed for lack of jurisdiction.

Remanded.

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[1] Added by 60 Stat. 50 (1946), as amended, 50 U.S.C. App. § 32 (1952), as amended, 50 U.S.C. App. § 32 (Supp. V, 1958).

[2] ". . . *Provided*, That notwithstanding the provisions of this subdivision return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation . . ."

[3] 28 U.S.C.A. § 2201 (Supp. 1958).

[4] 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-09 (1952).

2. Judgment of the United States Court of Appeals for the District of Columbia Circuit.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,733

September Term, 1958

WILLIAM P. ROGERS, Attorney General of the United States, Appellant, v. WALTER SCHILLING, Appellee.	C.A. 1784-58 United States Court of Appeals for the District of Columbia Circuit Filed May 21, 1959 Joseph W. Stewart Clerk

APPEAL from the UNITED STATES DISTRICT COURT for the DISTRICT OF COLUMBIA.

Before: Edgerton, Fahy and Washington, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the order * * * of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the complaint for lack of jurisdiction.

Per Curiam.

Dated: May 21, 1959.

3. Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. § 1, *et seq.*:

§ 2. **Definitions**

The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * * *

§ 7. * * *

* * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property

thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter covered, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * *

§ 9. **Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover**

(a) Any person not an enemy or ally of the enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the pay-

ment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United

States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * * *

§ 32. **Return of property**—(a) Conditions precedent The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * * * * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the

provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation: * * *

* * * * *

(5) that such return is in the interest of the United States.

* * * * *

§ 39. * * *

(a) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act * * *.

4. The Declaratory Judgment Act, as amended August 28, 1954, c. 1033, 68 Stat. 890, 28 U.S.C., § 2201 (Supp. V):

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court

of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

5. § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C., § 1009.

§ 1009. **Judicial review of agency action.**

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable.

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review.

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statu-

tory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

6. Act of June 25, 1948, c. 646, 62 Stat. 930, 28 U.S.C. § 1331, 28 U.S.C.A., § 1331:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Appendix

7. Hearing Examiner's Decision.

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

OFFICE OF ALIEN PROPERTY

In the Matter of: WALTER SCHILLING Title Claim No. 37310	Docket No. 56 T 85

RECOMMENDED DECISION OF HARRY R. HINKES,
HEARING EXAMINER

This is a proceeding for the return of vested property arising out of a claim filed pursuant to the Trading With the Enemy Act, as amended (50 U.S.C. Appx. 1-40) and conducted in accordance with the Rules of Procedure for Claims (8 CFR Part 502).

By Vesting Order No. 97, effective August 17, 1942, there were vested 82 shares of G. Bruning Tobacco Extract Co., Inc., as property of the estate of Mrs. G. Schilling, deceased, Bremen, Germany. By Vesting Order No. 10203, effective December 8, 1947, an obligation of one A. DeWitt Alexander and 570 shares of Pacific Lighting Corporation and accrued dividends were vested as property of Walter Schilling, claimant herein. By Vesting Order No. 12172, effective October 20, 1948, there was vested a certain debt of the Lynchburg Trust & Savings Bank, Lynchburg, Virginia, as property of the representatives and heirs of Mrs. G. Schilling, deceased. The vested property has been liquidated and the sum of over $68,000 represents claimant's share of the accounts. The claim is therefore, an excepted claim within the meaning of section 502.2(h) of the Rules.

Pursuant to notice a hearing was held before me at which Richard P. Lott, Esq., represented the Chief of the Claims Section. Henry T. Fillman, Esq., of Katz & Sommerich, New York City, appeared for claimant. The only oral testimony was that of an attorney, M. Magdalena Schoch, an employee of this Office, called as a witness by the claimant with respect to her personal knowledge of conditions in Germany. The rest of the record is documentary. Briefs were filed by both parties.

PROPOSED FINDINGS OF FACT

1. Claimant, Walter Schilling, was born in Bremen, Germany, in 1910 and has always been a citizen and resident of Germany.

2. Claimant was the owner of the claimed property immediately prior to its vesting.

3. Claimant has never been a member of the Nazi Party or of any of its affiliates. On the contrary, he was an opponent of Nazism and known as such.

4. The Weimar Constitution of 1919 declared the equality of all citizens and made all German citizens eligible for public office in Germany "without distinction." These civil servants were "servants of the whole community, not of a party."

5. Under the Nazis, various laws were promulgated destroying the political freedom of public officials such as judges and making their appointment conditional upon their complete support of Nazism. This support could be expressed obviously by membership in the Party or in one of its affiliates. Political reliability was substituted for technical competence as the standard for civil service.

Similar political tests were applied by government examiners to applicants seeking admission to the bar.

6. Only one political party was recognized by the German government under the Nazis, the Nazi Party. The reconstruction of dissolved, or the formation of new, political parties and even attempts at such activities were treated as treason. The Nazi administration regarded all who were not Nazis as ineligible for public office and the practice of law.

7. Claimant received a law degree from the University of Munich in 1934 and thereafter served as a Referendar (apprentice) in the courts of Bremen until 1939 when he became eligible to take his final examinations for admission to the legal profession.

8. Claimant knew that Nazi allegiance was a prerequisite for admission to the legal profession. Nevertheless he refused to support the Nazi movement and rejected an invitation to become a member of the Nazi Party. As a consequence, he was not considered politically reliable.

9. Claimant took his final examinations in 1939 before the Chairman of the Examining Board, a prominent Nazi who would not pass any non-Nazi applicant. Claimant failed to pass. Claimant was informed by this chairman that claimant would find no position if claimant did not cooperate with the Nazis, because claimant had placed himself outside the community of the German people. Claimant, nevertheless, refused to change his position.

10. Claimant took a second entrance examination in 1940 before another Board Chairman and passed, but was told he could not hope for a career without party membership.

11. Claimant, knowing that he would not be licensed to practice law or be accepted for public service without party membership, obtained a job as a legal assistant or clerk in a Bremen law firm. In 1942 he went to work for a German industrial firm in a legal capacity where he continued until the end of the hostilities. Claimant then, for the first time, applied for admittance to the bar and was admitted to practice in Bremen as a lawyer.

PROPOSED CONCLUSIONS

The only issue in this proceeding is claimant's eligibility for a return of the claimed property under section 32 of the Act. Claimant, being a German citizen present in Germany throughout the war, must show that he failed to enjoy full rights of citizenship throughout the period of hostilities as a result of German laws discriminating against political, racial or religious groups. *In the Matter of Kashiro Maeda,* Title Claim No. 45628, Docket No. 1343, February 3, 1954.

In substance this claim proceeds upon the argument that claimant was denied admission to the practice of law, which was a substantial deprivation of his rights as a citizen; that this denial was due to his being non-Nazi (or anti-Nazi); that non-Nazis (or anti-Nazis) were recognized and treated as a political group by the Nazi authorities and under Nazi laws.

It is conceded by the Claims Section that Walter Schilling was not a member of the Party or any of its affiliates and that this status precluded his admission to the Bremen bar. It is argued, however, that the denial of this profession's practice was not a deprivation of a right of citizenship, but merely a denial of a privilege accorded members of the Nazi Party and, therefore, not a basis for a finding of eligibility under § 32(a)(2)(D). Cf. *In the Matter of*

Hermann Winter, Title Claim No. 45960, Docket No. 56 T-37, decision of the Hearing Examiner dated May 24, 1956, adopted July 25, 1956. In that case, I held that a schoolteacher's dismissal for his non-membership in the Nazi Party was not a denial of a "right due generally qualified individuals" but merely a loss of privileges extended only to Party members and followers. In the instant claim, however, unlike the *Winter* claim, the record makes it clear that, before the Nazis came into power, claimant had a *constitutional right* to be eligible for public office as a judge or licensed for the private practice of law regardless of political belief. The practice of law was no mere privilege. The Supreme Court of this country has ruled that the practice of law is not a matter of the State's grace; a person cannot be prevented from practicing except for valid reasons. *Schware* v. *Board of Bar Examiners of the State of New Mexico,* 25 Law Week 4276 (1957). The purport of Articles 109, 118, 128, 129, *et al.* of the German Weimar Constitution is certainly similar. The Nazis destroyed that right as well as the right to be eligible for public office which was also made dependent upon the applicant's politics. This change in rights was a substantial loss to the German citizen. It is futile to argue that the Nazis created this condition by the enactment of a law. That law, by its destruction of political freedom and by its discrimination against nonconforming political beliefs is entitled to no more credit and support from us than are the notorious Nazi confiscatory decrees which discriminated against the German Jew, which decrees German courts have repudiated as "in contradiction with natural law," "immoral," "contrary to the fundamental principles of any lawful-state order." See *1 Sueddeutsche Juristen Zeitung col. 36* (1946); *2 Sueddeutsche Juristen Zeitung col. 257, 262* (1947); *8 Neue Juristische Wochenschrift 905* (1955) and

discussion by Domke, *American-German Private International Law*, page 51 *et seq.* I cannot give Nazi legalism a morality and dignity which our courts usually accord the acts of another government. Any Nazi attempt, albeit by semblance of legislation, to diminish a constitutional right for invalid, discriminatory reasons should not be upheld. See No. 296, 20 *Dept. State Bull.* 592 (1949); *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (1954).

It is not sufficient, however, that claimant failed to enjoy full rights of citizenship pursuant to German law; to recover, claimant must show that the deprivation was pursuant to a law which discriminated against political, racial or religious groups. The totalitarian laws which impaired or destroyed the German constitutional rights were universal in scope. If the civil rights lost under the Nazis were to be regarded as the sole basis for eligibility residence in Nazi Germany would automatically qualify one for return. Cf. *Matter of Maeda, supra.* Congress intended but a cautious and limited program of return for certain German *minorities.* See House Hearings on H. R. 5089, 79th Cong., 2d Sess. p. 81. A claimant's denial of civil rights, *discriminatorily*, was made the test and measure of eligibility.

To meet this issue, claimant argues that he and the others who *refused to support* the Nazi Party, unlike the bulk of the German population, were barred from private practice and public office. They were not just non-members of the Party. Such description would include perhaps 90% of the German population, since Party membership was limited to about one-tenth of the population. Department of State, *National Socialism*, page 45 (1943). This claim does not require a conclusion that mere non-members be deemed a persecuted political group. It suggests, however, that those who were expected and invited to be Nazi

Party members but who refused to join be considered a political group. The membership of such a group was necessarily a very small minority of the population. The Nazis considered them "politically unreliable" and regarded them as having segregated themselves from the rest of the community. The Nazis punished them as a group by disqualifying them from the legal profession. Unlike the loss of religious freedom which was experienced by all Germans, this deprivation was imposed upon a small minority of Germans, i.e., those who refused to support Nazism. Cf. *Matter of Hannah von Bredow,* Title Claim No. 42152, Docket No. 54 T 70, decision of the Hearing Examiner dated February 28, 1956. Claimant cites Mr. Peyton Ford, then Assistant to the Attorney General, who said in 1948, that the

> ". . . groups who will benefit from the proposed amendment are the very groups who were regarded as enemies by the countries against which this country went to war. . . . In the imposition of persecution, they were treated as groups. (Sen. Rep. No. 784 on S. 2764, Appendix H, p. 12)

Claimant argues, therefore, that this Office should also treat them as a group. In this respect, claimant's position is not in disagreement with the definition of "group" in Webster's New International Dictionary, 2d Edition (1944):

> "An assemblage of persons or things regarded as a unit because of their comparative segregation from others."

Since the group described by claimant was persecuted for its political behavior, claimant contends that this Office must regard it as a political group.

Claimant continues by suggesting a more liberal reading of § 32. He cites the testimony of the Deputy Director of this Office that

> . . . Under [section 32] . . . enemy citizens who had been persecuted for political, racial or religious *reasons* could have their former property returned to them. (Hearings, Administration of the Trading with the Enemy Act, 83rd Cong., 1st Sess., p. 104.) (Emphasis added)

This language is repeated in the Final Report of the Subcommittee, page 6. Claimant points to the indisputable fact that he was persecuted for political *reasons*, even if such persecution was not directed against a political *group* and seeks to recover because the former was the real intent of the legislation. He cites, *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284; *People of Puerto Rico* v. *Shell Co.*, 302 U. S. 253; *Rector, etc. of Holy Trinity Church* v. *United States*, 143 U. S. 457, *Markham* v. *Cabell*, 326 U. S. 404 and *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, to the effect that we are not always confined to a literal reading of a statute in construing it, but may and should consider its object and purpose so as to effectuate rather than destroy its spirit and force which the legislature intended to enact.

The arguments of the claimant appear quite persuasive to me. The Chief of the Claims Section, however, contends that the Director has already considered these arguments and rejected them in the *Matter of Walter Lutz*, Title Claim No. 42142, Docket No. 55 T 75, decision of the Hearing Examiner dated September 30, 1955, pet. for rev. den. April 2, 1956. In that case, the Hearing Examiner found that a German physicist who was anti-Nazi was refused a civil service teaching position because he was not a member of the Party or of its affiliates. These circumstances alone were found insufficient to base a find-

ing of a political group within the meaning of § 32. In the present case, claimant was offered Party membership. He declined although he knew he would be disqualified from practicing his profession. However "large and amorphous" (to use the langauge in the *Matter of Mathilde Dietrich*, Title Claim No. 37849, Docket No. 1645, decision of the Director dated August 11, 1955) the group of non-Nazis and anti-Nazis were, the group of Germans who were offered the "privilege" of Party membership but who had the moral courage to reject the invitation even where such rejection labelled the rejector as "politically unreliable" must necessarily have been quite small. For that reason I do not believe the *Lutz* decision to be controlling.

I, therefore, conclude that:

1. Claimant, Walter Schilling, was resident within Germany on and after December 7, 1941.

2. Claimant is not entitled to the return of vested property under § 9 of the Act.

3. Claimant failed to enjoy full rights of German citizenship during the period of hostilities as a consequence of German laws, decrees or regulations discriminating against a political group, i.e., those who rejected an invitation to join the Nazi Party.

4. Claimant is eligible for the return of vested property under § 32 of the Act.

ACCORDINGLY, I recommend that Title Claim No. 37310, Docket No. 56 T 85 be allowed.

HARRY R. HINKES,
Harry R. Hinkes,
Hearing Examiner.

Dated: May 31, 1957.

8. Decision of Director, Office of Alien Property.

* * * * *

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

OFFICE OF ALIEN PROPERTY

WASHINGTON, D. C.

In the matter of WALTER SCHILLING	Claim No. 37310 Docket No. 56 T 85

DECISION OF DIRECTOR

This claim, which is for the return of the proceeds of vested property totalling approximately $68,000, is before me with a recommendation by the Hearing Examiner for allowance under section 32(a)(2)(D) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 32(a)(2)(D). A review of the record in this case compels me to reject the Examiner's recommendations and to disallow this claim.

The pertinent facts are as follows:

1. Claimant, Walter Schilling, was born in Bremen, Germany, in 1910. He has always been a citizen and resident of Germany.

2. The vested property from which the proceeds herein claimed were derived was owned by the claimant immediately prior to vesting.

3. Claimant was opposed to the principles of Nazism, and, in 1937, refused an invitation to join the Nazi party.

4. In 1934 claimant received a law degree from the University of Munich and thereafter served until 1939 (except for a one year period) as a "referendar" (young barrister attending the courts to qualify for admission to the bar) in the courts of Bremen. In 1939, claimant became eligible to take his final examination for admission to the legal profession. At that time the chairman of the examining board in Bremen was a prominent Nazi who would not pass any applicant who was not a member of the Nazi party or one of its affiliated organizations. The chairman refused to pass claimant, giving as his reason: "very poor performance professionally in the major task and two examination papers and in the oral examination. Politically completely passive." During the oral interview required of all candidates, the chairman informed the claimant that it would be useless for him to pass the examination since he had not joined a Nazi organization and thereby had placed himself outside the community of the German people.

5. After failing his final examination in 1939 claimant served an additional six months as a referendar in the Bremen courts. He took the final examination for the second time in March 1940 before another chairman of the examining board who passed him. During the oral interview, however, this chairman told claimant that he could not hope for a career if he did not belong to the Nazi party or an affiliated organization.

6. An applicant for admission to the bar at the time claimant became eligible to apply for admission (and until after the cessation of hostilities) was, as a practical matter, required to be a member of the Nazi party or an

affiliated organization. In view of this requirement, claim ant, knowing that he would not be licensed without suc membership, did not apply for permission to practice la after passing his examination. Instead he served as legal clerk in a Bremen law firm until 1942 and in tha year he went to work for a German industrial firm in legal capacity where he was employed until the end o hostilities. Thereafter, claimant applied for admission t the bar and was licensed to practice law in 1946.

As a wartime citizen and resident of Germany, claiman is ineligible for the return of vested property unless h qualifies under the first proviso of section 32(a)(2)(D) o the Trading with the Enemy Act as

> "an individual who, as a consequence of any law decree, or regulation of [Germany] discriminatin against political, racial, or religious groups, has at n time between December 7, 1941, and the time whe such law, decree, or regulation was abrogated, enjoye full rights of citizenship under the law of such nation."

The claimant argues that since the Weimar Constitutio guaranteed all qualified applicants the right to a licens to practice law, the Nazi government's abrogation of tha right was a substantial deprivation of the rights of Ger man citizenship within the meaning of the above-quoted proviso. There is no doubt that claimant and his fellow German nationals who lived under the Nazi regime were deprived of most of the civil rights which had been granted by the Weimar Constitution. However, this genera deprivation of rights cannot properly be held to afford the basis for relief under the first proviso of section 32(a)(2) (D). To construe the proviso in this way would produce the absurd result of making eligible for return every Ger man claimant who was born prior to the advent of the Nazi regime. The language of the proviso is plainly not

open to that construction and its clear intent is to make eligible for return only those German nationals who, as a result of laws or decrees discriminating against political, racial or religious groups, enjoyed rights of citizenship after December 7, 1941, substantially inferior to the *contemporary rights of German citizens generally.* See *Matter of Kashiro Maeda,* Title Claim 45628, Decision of Director, February 3, 1954, where I stated:

> ". . . The Congress which enacted the law was well aware that our enemies in the war were dictatorships, in which the civil rights of the common citizen were few, and that life during the war years was hard for all but the favored classes. These circumstances were not made the tests of eligibility for return; if they had been, practically the entire population of the enemy countries would be eligible for return. . . . The return provided by the first proviso of Section 32(a)(2)(D) was an act of grace, limited to the persecuted minorities who suffered so grievously at the hands of enemy governments. . . . The tests prescribed by Congress for eligibility for return as a member of this limited class were definite, clear and strict. For an enemy national to qualify under the proviso it must be clear that, at all times after December 7, 1941, the *claimant was deprived of the rights of citizenship commonly enjoyed by other inhabitants of the country.* . . ." (Italics added)

See also *Matter of Hermann Winter,* Title Claim 45960, Recommended Decision of Hearing Examiner adopted by Deputy Director January 25, 1956, which involved the claim of a German school teacher who was dismissed because of non-membership in a Nazi organization. In that decision it was stated:

> "To be eligible under this section of the Act [section 32] a claimant must show that the civil rights of which

> he was deprived were generally available to the majority of German citizens. The loss of privileges available only to members of the Nazi party is not a denial of civil rights within the meaning of section 32(a)(2)(D)."

Even if it were to be assumed that denial of a license to practice law deprived claimant of full rights of citizenship, his claim must be disallowed for the reason that he was not a member of a political, racial or religious group that was discriminated against. Anti-Nazis and non-Nazis do not constitute a political group. *Matter of Mathilde Dietrich,* Claim 37849, Decision of Director, August 11, 1955; *Matter of Walter Lutz,* Claim 42142, Hearing Examiner's decision September 30, 1955, petition for review denied by Director April 2, 1956; *Matter of Heinrich Georg Lutz,* claim 42143, Hearing Examiner's recommended decision adopted by Director June 22, 1956. As was stated in the *Dietrich* claim, *supra,*

> "neither the language nor the legislative history of section 32 indicates that Congress intended the phrase 'political groups' to include a body of individuals so amorphous and so large as that described by the Hearing Examiner [German citizens present in Germany during the war, who were not Nazi sympathizers and who opposed Nazism]."

In *Matter of Walter Lutz, supra,* a case which is indistinguishable from the instant matter, I disallowed the claim of an anti-Nazi physicist with two graduate degrees who was barred from the teaching profession in Germany because he was not a member of the Nazi party or one of its affiliated organizations of teachers. The disallowance was based on a holding that anti-Nazi graduate physicists so barred from the teaching profession did not constitute a

political, racial or religious group within the purview of section 32(a)(2)(D) of the Act. See also *Matter of Hermann Winter, supra.*

Based upon the foregoing findings of fact and the record, I conclude that:

1. Claimant was a wartime resident of Germany and thus, as an enemy under section 2(a) of the Trading with the Enemy Act, as amended, is ineligible for the return of vested property under section 9(a); and

2. Claimant does not qualify for return under the standards of the first proviso of section 32(a)(2)(D).

Accordingly, Title Claim 37310 is hereby disallowed.

(Signed) Dallas S. Townsend

DALLAS S. TOWNSEND,
Assistant Attorney General
Director, Office of Alien Property.

April 2, 1958.

No. 359

In the Supreme Court of the United States

OCTOBER TERM, 1959

WALTER SCHILLING, PETITIONER

v.

WILLIAM P. ROGERS, Attorney General

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

DAILEY S. TOWNSEND,
Assistant Attorney General,

IRVING JAFFE,
GEORGE B. SEARLS,
Attorneys,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING, PETITIONER

v.

WILLIAM P. ROGERS, Attorney General

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the district court (J.A. 38)[1] denying the motion to dismiss is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 20-21) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 21, 1959 (Pet. 22). The petition for a

[1] The Joint Appendix in the Court of Appeals is designated herein as "J.A."

writ of certiorari was filed on August 18, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a district court has jurisdiction under the Administrative Procedure Act, the Federal Declaratory Judgment Act, or any other provision of law to review an administrative decision under Section 32 of the Trading with the Enemy Act which holds that an applicant is not a persecuted person eligible for the return of vested property under the provisions of Section 32(a)(2)(D).

STATUTES INVOLVED

The pertinent provisions of Sections 7(c), 9(a), and 32(a)(2) of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. § 1, *et seq.*, as well as the provisions of the Declaratory Judgment Act, as amended, 68 Stat. 890, 28 U.S.C. (Supp. V) § 2201, and the provisions of Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009, are printed in the petition (pp. 23-30). In addition, we have set forth in the Appendix to this brief (*infra*, pp. 14-15) the provisions of Sections 9(f), 32(a)(5), and 32(f) of the Trading with the Enemy Act.

STATEMENT

Since the case was disposed of below on a motion to dismiss, it is necessary to consider only the facts as alleged in the complaint (J.A. 32-37).

(1) The petitioner is, and has been at all relevant times, a resident and citizen of Germany (J.A. 32), and, admittedly, is an "enemy" who may not sue under Section 9(a) of the Trading with the Enemy Act (Pet. 17). He claims, however, to be qualified for a return of vested property under Section 32(a)(2)(D) of the Act,[2] on the ground that he was a member of a "political group" within the meaning of that section, who was discriminated against and substantially deprived of full rights of German citizenship in that as a known opponent of Nazism he was denied admission to the practice of law in Germany. The Nazis, he alleges, recognized and treated anti-Nazis and non-Nazis as a political group (J.A. 34). Deeming himself qualified for a return under Section 32(a)(2)(D), the petitioner filed with the Office of Alien Property his Notice of Claim (J.A. 34). After a hearing a hearing examiner concluded that the petitioner was a member of a political group, those who rejected an invitation to join the Nazi Party, and that he was eligible for a return under Section 32; he recommended allowance of the claim (J.A. 34-35).[3] The Director of the Office

[2] Section 32(a)(2)(D) provides that a return of vested property may be made "to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation * * *." Pet. 26-27.

[3] The hearing examiner's Recommended Decision is printed in the petition, pp. 31-39. According to the exam-

of Alien Property, however, rejected the examiner's recommendation, determined that the petitioner had not been denied full rights of German citizenship and was not a member of a political group that was discriminated against, and concluded that the petitioner did not qualify for a return under Section 32. Accordingly he disallowed the claim.[4] The Attorney General determined not to review the decision of the Director, so the petitioner had exhausted his administrative remedies (J.A. 35).

(2) In addition to these allegations of fact, the petitioner, in his complaint, alleged (par. 11) that the provisions of Section 32(a)(2)(D) do not permit the Attorney General (for whom the Director acts) any discretion in determining the eligibility of a claimant for a return under said section (J.A. 34). The complaint also alleged (par. 17) that the decision of the Director was illegal and erroneous in that there was no legal substantial evidence on the record as a whole to support it; that it was unreasonable, arbitrary and capricious and in express disregard of the purpose of Congress (J.A. 35). And, finally, the complaint alleged that there existed an "actual controversy" as to the petitioner's eligibility, that the effect of the decision would be to circumvent and destroy the purposes of Congress, and that "No Federal Statute precludes judicial review of the aforesaid Agency action" (J.A. 36).

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iner, all of the evidence was documentary, except for the testimony of one witness called by claimant (Pet. 32).

[4] For the Decision of the Director, see Pet. 40-45.

The complaint prayed a review and a setting aside of the decision of the Director, a declaration that the petitioner is eligible for a return of the vested property, a direction to the Attorney General to determine whether a return to the petitioner is in the interest of the United States, and other and further relief (J.A. 36).

The Attorney General moved to dismiss the complaint for want of jurisdiction on the ground that administrative action under Section 32 of the Trading with the Enemy Act is not subject to judicial review (J.A. 37). The District Court denied the motion, and made the findings required by Section 1292(b) of Title 28, United States Code, which authorizes certain interlocutory appeals (J.A. 38). The Court of Appeals granted leave to appeal (J.A. 40), and, after hearing, reversed and remanded with directions to dismiss for lack of jurisdiction (Pet. 20-22).

ARGUMENT

1. What the motion to dismiss admitted.

In the Statement, *supra*, we have designated as "(1)" the paragraph setting out the allegations of fact in the complaint. In paragraph "(2)" we have set out the allegations of the complaint which are either conclusions of law or characterizations by the petitioner of the acts of the Director of the Office of Alien Property, such as the allegations that the Director's decision was "illegal," "arbitrary and capricious," and that "there was no legal substantial evidence on the record as a whole to support it."

The petitioner proceeds on the assumption that the motion to dismiss admitted his conclusions and characterizations, as well as his allegations of fact. See the Questions Presented (Pet. 2-3) and, for examples, pages 9, 12, 17, 18, and 19 of the petition.[5] The well-settled rule, however, is that a motion to dismiss admits the facts well pleaded, but that it does not admit the conclusions of law stated in the complaint or the attempts of the pleader to characterize acts as "illegal," or "arbitrary and capricious." See *Newport News Co.* v. *Schauffler*, 303 U.S. 54, 57; *Ryan and Scoggin*, 245 F. 2d 54, 57 (C.A. 10); *Dayton* v. *Gilliland*, 242 F. 2d 227 (C.A.D.C.), certiorari denied, 355 U.S. 813; *Michaelson* v. *Herren*, 242 F. 2d 693, 696-697 (C.A. 2); *Mengel* v. *Nashville Paper Prod. & Spec. Wkrs. Union*, 221 F. 2d 644, 647 (C.A. 6). Also, when specific facts are alleged which qualify or contradict the conclusory allegations, the court will disregard the latter in determining the nature of the cause of action stated in the complaint. *Mengel* v. *Nashville Paper Prod. & Spec. Wkrs. Union, supra; Gentila* v. *Pace*, 193 F. 2d 924, 926 (C.A.D.C.), certiorari denied, 342 U.S. 943; *Anderson* v. *Seeman*, 252 F. 2d 321, 325-326 (C.A. 5).[6]

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[5] In addition, the complaint alleged that the provisions of Section 32(a)(2)(D) gave the Attorney General no discretion in determining the eligibility of a claimant under Section 32(a)(2)(D) for a return (J.A. 34) and that no Federal statute precludes judicial review of the "Agency" action (J.A. 36).

[6] The *Chicago Junction Case*, 264 U.S. 258, the only authority cited on the point by the petitioner, was a case in

Reading the complaint as a whole it is clear that when the petitioner alleged that the Director's decision was not supported by substantial evidence, he meant only that it was erroneous as a matter of law on the evidence presented. The rhetorical allegations of "arbitrary and capricious," "illegal," and so on were not admitted by the motion, and the question presented was simply whether the District Court had jurisdiction to review an administrative decision under Section 32 which was claimed to be erroneous as a matter of law.

2. The decision below was clearly correct and there is no conflict of decision.

Including the present case, the question of judicial review of administrative action under Section 32 has been before the Court of Appeals for the District of Columbia Circuit five times, and each time the decision has been that there is no jurisdiction. For the earlier cases see *McGrath* v. *Zander*, 177 F. 2d 649 (C.A.D.C.); *Hawley* v. *Brownell*, 215 F. 2d 36 (C.A.D.C.); *Tiedemann* v. *Brownell*, 222 F. 2d 802 (C.A.D.C.); *Legerlotz* v. *Rogers*, 266 F. 2d 457 (C.A.D.C.).[7] The uniform basis for these holdings

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which there was an allegation in general terms of illegal administrative action ("wholly unsupported by evidence"), which was not qualified or contradicted by any specific allegations or exhibits.

[7] *Legerlotz* is pending in this Court on a petition for a writ of certiorari, No. 213, this Term. *Tiedemann*, like the present case, involved a question of "eligibility" under Section 32(a)(2)(D); both *Hawley* and *Tiedemann* involved claims of discrimination or persecution under the first pro-

has been that under the Trading with the Enemy Act the only judicial remedy open to a claimant to vested property is a suit in equity under Section 9(a).

This accords with the numerous decisions in a variety of contexts in this Court and in other courts to the effect that the "sole relief and remedy" provision of Section 7(c) (Pet. 24) means just what it says. See *Becker Co.* v. *Cummings*, 296 U.S. 74, 79; *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 487; *Von Opel* v. *Uebersee Finanz Korporation*, 225 F. 2d 530 (C.A.D.C.), certiorari denied, 350 U.S. 935; *Berger* v. *Ruoff*, 195 F. 2d 775 (C.A.D.C.), certiorari denied, 343 U.S. 950; *Pflueger* v. *United States*, 121 F. 2d 732 (C.A.D.C.), certiorari denied, 314 U.S. 617; *Cummings* v. *Hardee*, 102 F. 2d 622, 627 (C.A.D.C.), certiorari denied, 307 U.S. 637; *Ecker* v. *Atlantic Refining Company*, 222 F. 2d 618, 621 (C.A. 4), certiorari denied, 350 U.S. 847; *Koehler* v. *Clark*, 170 F. 2d 779, 780 (C.A. 9); *Becker Steel Co.* v. *Cummings*, 95 F. 2d 319, 320 (C.A. 2), certiorari denied, 305 U.S. 604; *Kuttroff* v. *Sutherland*, 66 F. 2d 500, 501 (C.A. 2); *Kahn* v. *Garvan*, 263 Fed. 909, 915 (S.D.N.Y.).

This also accords with the plain language of the Act. Section 7(c) provides:

> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter * * * transferred * * * to the Alien Property Custodian * * * or seized

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viso of Section 32(a) (2) (D). *Zander* also involved the construction of Section 32(a) (2) (D).

by him shall be that provided by the terms of this Act * * *. [Pet. 24.][8]

The sole *judicial* remedy "provided by the terms of this Act" for a recovery of property is a suit under Section 9(a). *Becker Co.* v. *Cummings, supra.* Section 32 also provides a remedy, but that is purely administrative and discretionary. *McGrath* v. *Zander, supra.*

The petitioner urges (Pet. 18-19) that Section 7 (c) has only the effect of limiting actions for the *recovery* of property to suits under Section 9(a) by non-enemies, leaving enemies, who may not sue under that section, free to avail themselves of other legal remedies which are forbidden by 7(c) to non-enemies. This curious reading of "sole relief and remedy" is not justified by the language of the Act or by any of the decisions petitioner cites (Pet. 19). For instance, when this Court in *Becker Co.* v. *Cummings, supra,* 296 U.S. at 79, said that the "all-inclusive language of § 7(c)" denied to a non-enemy owner any remedy except under Section 9(a), there was no implication that enemies could have other remedies. "[S]ole relief and remedy" means the "one and only remedy" for "any person having any claim," and if it is "all-inclusive" it does not exempt enemies.

It was obviously the intent of Congress to channel

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[8] Also Section 9(f): "Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not or execution, or subject to any order or decree of any court" (*infra,* p. 14).

all litigation involving vested property[9] into Section 9(a) and to bar all other forms of litigation. Judicial review under the Administrative Procedure Act (Pet. 28-30) is a form of "relief and remedy" and hence barred, as the Court of Appeals held in *McGrath* v. *Zander*, *supra*.[10]

By parity of reasoning there is no jurisdiction under the Declaratory Judgment Act to review action under Section 32, for a declaratory judgment is a form of "remedy" and it is not "provided" by the

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[9] Except suits by creditors to recover debts. See Section 34 of the Act.

[10] The petitioner suggests (Pet. 14) that Section 32 does not clearly preclude judicial review. This apparently refers to Section 12 of the Administrative Procedure Act (5 U.S.C. 1011), which, however, applies to "subsequent legislation." The amendment to Section 32, under which petitioner claims, was enacted August 8, 1946 (60 Stat. 930), but that is beside the point. The section which precludes judicial review of action under Section 32 is Section 7(c), as amended in 1918 (40 Stat. 1020), and that applies to "any claim" of "any person" to property "heretofore or hereafter * * * [seized] by the Alien Property Custodian" (Pet. 24). The petitioner does not urge that there has been a repeal of Section 7(c) *pro tanto* and by implication. The legislative history cited at length by the petitioner (Pet. 10-13) is worthy of the comment that it furnishes "dubious bases for inference in every direction" (*Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260), and the legislative discussion of what would be a "legal wrong" under the Administrative Procedure Act (Pet. 10-12) cannot overcome the clear language of Section 10 of that Act (5 U.S.C. 1009), which exempts from judicial review cases where "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion," cited by the Court of Appeals in *McGrath* v. *Zander*, 177 F. 2d 649, 651 (C.A. D.C.).

Trading with the Enemy Act. And in and of itself that Act is not a source of jurisdiction for the district courts. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671; *Putnam* v. *Ickes*, 78 F. 2d 223, 226, quoted and followed in *Marshall* v. *Crotty*, 185 F. 2d 622 (C.A. 1).

In this connection, petitioner puts misplaced reliance on *Perkins* v. *Elg*, 307 U.S. 325, and *McGrath* v. *Kristensen*, 340 U.S. 162 (Pet. 18). Those cases dealt with citizenship or eligibility for citizenship and with deportation. In such situations the guaranty of due process under the Fifth Amendment applies, and there is jurisdiction to review the administrative decision, at least upon *habeas corpus*, so the statutory provision that the Attorney General's decision should be "final" is construed to mean merely final as an administrative matter; the declaratory judgment can be made available as an alternative form of remedy.

In the present situation there is no constitutional requirement to read the statute other than literally, for petitioner admits that he is an "enemy"; hence he is not within the due process and just compensation clauses of the Fifth Amendment. *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120-121; *Silesian-American Corporation* v. *Markham*, 156 F. 2d 793, 797 (C.A. 2), affirmed *sub nom. Silesian-American Corp.* v. *Clark*, 332 U.S. 469.

Finally, there is no substance to the argument of the petitioner, apparently advanced as a general proposition (Pet. 17), that a Federal court has jurisdiction to review any agency decision which is illegal,

arbitrary or capricious, or otherwise in excess of delegated powers, and for which he cites *Harmon* v. *Brucker*, 355 U.S. 579, and other cases. Whether Congress is to be held to have intended judicial review depends upon the whole setting and scheme of the statute. *Estep* v. *United States*, 327 U.S. 114, 120; *Switchmen's Union* v. *Board*, 320 U.S. 297, 300-302. There is nothing in Section 32 to indicate that judicial review was intended; the Custodian "may" return property, and only when he finds that such action would be "in the interest of the United States" (Pet. 26-27), and Section 32(f) (*infra*, p. 14) provides that publication of a notice of intention to return shall give no right of action to compel a return. Moreover, the interpretation of Section 32 is within, and not in excess of, the authority of the Attorney General or his delegate.[11]

In summary, the law applicable to this case is settled and there is no conflict of decisions.

3. The case does not call for a review by this Court.

The petitioner urges that the question presented here is of fundamental importance to the proper

[11] Section 32 appears to be a statute in which Congress has "committed to agency discretion" even problems of statutory construction. Cf. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318; *United States* v. *Babcock*, 250 U.S. 328, 331; *Work* v. *Rives*, 267 U.S. 175, 183. Whether the petitioner was a member of a "political group" which had been discriminated against is a question of the construction of Section 32, and the fact that the Nazis treated all non-Nazis as a "political group" (J.A. 34) does not mean that the petitioner was a member of such a "group" for purposes of Section 32.

administration of Section 32, and that hundreds, or perhaps thousands, of cases may be affected (Pet. 7, 9-10). However, all of the cases to date involving the point have arisen in the District of Columbia Circuit, and future cases, if any, will probably arise there also, because of considerations of venue.[12] The Court of Appeals has consistently held, over a period of ten years, that there is no jurisdiction to review administrative action under Section 32. Since the decision below appears to be right, it is submitted that there is no need for a review by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

SEPTEMBER 1959.

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[12] Under Section 9(a), however, the plaintiff in a Section 9(a) suit may sue in the district of his own residence.

APPENDIX

Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. § 1, *et seq.*:

SEC. 9. * * *

(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

* * * * *

SEC. 32(a). The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian * * * or the net proceeds thereof, whenever the President or such officer or agency shall determine—

* * * * *

(5) that such return is in the interest of the United States.

* * * * *

(f) At least thirty days before making any return to any person other than a resident of the United States or a corporation organized under the laws of the United States, or any State, Territory, or possession thereof, or the District of Columbia, the President or such officer or agency as he may designate shall publish in the Federal Register a notice of intention to make such return, specifying therein the person to whom return is to be made and the place where the property or interest or proceeds to be returned are located. Publication

of a notice of intention to return shall confer no right of action upon any person to compel the return of any such property or interest or proceeds, and such notice of intention to return may be revoked by appropriate notice in the Federal Register. * * *

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MOTION FOR LEAVE TO FILE

AMICUS BRIEF

ON BEHALF OF HANNAH

BREDON ET AL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING, *Petitioner*,

v.

WILLIAM P. ROGERS, Attorney General.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE ON BEHALF OF HANNAH VON BREDOW ET AL.

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November 20, 1959

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING, *Petitioner*,

v.

WILLIAM P. ROGERS, Attorney General.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, Mrs. Hannah von Bredow and her children, Marguerite Linzbach, Alexandra Bachmann, Diana Saurma, Philippa von Thun-Hohenstein, Maria von Bredow, Herbert von Bredow and Leopold Bill von Bredow, by their counsel, respectfully move for leave to file a brief on the merits as *amici curiae* in this case.[1] Consent to such filing has been given by counsel for petitioner, and requested of the Solicitor General but refused.

Nature of Applicants' Interest

Section 32(a)(2)(D) of the Trading With the Enemy Act[2] provides that vested property may be returned to an individual who, although a citizen and resident of Germany during World War II, at no time enjoyed full rights of citizenship under the law of Germany as a consequence of any German law, decree or regulation discriminating against a political, racial or religious group.

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[1] Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case was granted October 26, 1959.

[2] Section 32(a) reads, in pertinent part, as follows:

"§ 32. Return of property—(a) Conditions precedent

"The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the

Pursuant to the statute and to the rules and regulations of the Office of Alien Property, Mrs. von Bredow and her children, citizens and residents of Germany during the critical period, timely filed claims for return of certain trust property held in their favor by the Union Trust Company of the District of Columbia and vested by the Attorney General in 1942. The basis for their claim was (1) that during the critical period, they had been members of a "religious group" discriminated against by laws, decrees and regulations of Germany, *i.e.*, the Confessional Synod, which was the group within the Evangelical (Protestant) Church resisting Nazi demands that the Church be subordinated to the State; (2) that they were members of a "political group" discriminated against; and (3) that as a consequence of German laws, decrees and

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net proceeds thereof, whenever the President or such officer or agency shall determine—

"(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

"(2) that such owner, and legal representative or successor in interest, if any, are not—

". . .

"(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section [March 8, 1946], was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation . . . ." Act of October 6, 1917, c. 106, 40 Stat. 411, as added December 18, 1941, c. 593, Title III, § 304, as added March 8, 1946, c. 83, § 1, 60 Stat. 50, as amended August 8, 1946, c. 878, § 2, 50 Stat. 930, 50 U.S.C. App. § 32.

regulations discriminating against the groups of which they were members, they at no time enjoyed full rights of citizenship under German law, as manifested by continued surveillance, denial of admission of certain of the claimants to a German university, denial of religious freedom, arrest and jailing of certain of the claimants. The facts are set forth in part in the Recommended Decision of the Hearing Examiner disallowing the claim, which Recommended Decision was adopted, without opinion, by the Deputy Director of the Office of Alien Property, whose decision was subsequently affirmed on review by the Attorney General. The Recommended Decision of the Hearing Examiner, the Decision of the Deputy Director of the Office of Alien Property and the Order of the Attorney General on Review, are appended to this motion.

Facts and Questions of Law Not Adequately Presented by the Parties and Their Relevancy

The decision of the Court of Appeals in the *Schilling* case that Section 7(c) of the Act precluded review by the District Court of a determination of eligibility under section 32(a)(2)(D) by the Office of Alien Property that was alleged to be illegal, without substantial evidence on the record to support it, arbitrary and capricious, also precluded judicial review of the administrative determination of eligibility made as to the von Bredows. In the *Schilling* case, the Office of Alien Property determined—and the Attorney General declined to review such determination—that Schilling was ineligible under section 32(a)(2)(D) for a return of vested property. It concluded (1) that Schilling was not a member of a "political group" within the meaning of the statute, despite the Hearing Examiner's finding that Schilling was a known opponent of Nazism and had refused to join the Nazi party when called upon to do so, and (2) that he had not failed to enjoy full rights of citizenship under the law of Germany, despite the denial to him of admission to the practice of law because "he was not considered politically reliable" and "had placed himself outside the community of the German people."

In the *von Bredow* case, the Attorney General determined that although "Mrs. von Bredow was an ardent and outspoken anti-Nazi, . . . as a matter of law she was not a member of a 'political group' within the meaning of the statute." Appendix at page 18a. And while not discussing whether the Confessional Church was a "religious group" within the meaning of the statute, except to affirm the Decision of the Office of Alien Property to that effect, he determined that:

> "While the record demonstrates that claimants were courageous and faithful communicants of the Confessional Church and under official pressure to renounce their allegiance to that church, it does not establish that they were denied full rights of citizenship within the meaning of the statute."

The position of the applicants is this:

(1) There is a justiciable controversy between the von Bredows and the Attorney General within the jurisdiction of the District Court in which the von Bredows should have an opportunity to demonstrate to that Court that the determination of the Attorney General as to their non-eligibility under section 32(a)(2)(D) is illegal. For example, section 32(a)(2)(D) permits return to individuals who "at no time . . . enjoyed full rights of citizenship under the law" of Germany, *i.e.*, who were deprived of *some* rights at all times; in contrast, the Attorney General's test, as set forth in his Order, is that "the record . . . does not establish that they were denied full rights of citizenship within the meaning of the statute," *i.e.*, were not deprived of *all* rights at all times. The von Bredows should be afforded the opportunity—and the Declaratory Judgment Act, the Administrative Procedure Act, and the general grant of federal-question jurisdiction provide that opportunity—thus to demonstrate that the Attorney General applied an erroneous legal test to the detriment of the von Bredows.

(2) Assuming, *arguendo*, that the Attorney General has any discretion in the making of eligibility determinations under section 32(a)(2)(D), then the von Bredows should be afforded the opportunity provided by the relevant

statutes to show that his conclusions, and those of his subordinates affirmed by him, were without substantial evidence on the record to support them, arbitrary and capricious. For example, the Hearing Examiner concluded that the Confessional Church was not a "religious group" discriminated against by the laws, decrees and regulations of Germany, despite laws, decrees and regulations, noted by the Hearing Examiner, directed by their express terms against the Confessional Church. Appendix at page 12a. In other words, he concluded that the Confessional Church, which was recognized as a group by the Hitler government and specifically singled out for discrimination, was not a "religious group" under the Act. Such conclusions, offensive to the facts, are not entitled to immunity from review by a court of competent jurisdiction.

(3) A recent major study of the right to judicial review teaches that only the "clearest statement of intent" by Congress should be allowed to preclude judicial review. Jaffe, "The Right to Judicial Review," Part I, 71 Harv. L. Rev. 401, Part II, 71 Harv. L. Rev. 769 (1958). The Court of Appeals in *Schilling* decided that section 7(c) of the Trading With the Enemy Act, enacted in a different context during World War I, twenty-eight years before the relevant proviso of section 32(a)(2)(D), barred judicial review of administrative determinations pursuant to it. We believe that this Court, in analyzing whether section 7(c) is that "clearest statement of intent," would be aided in having familiarity with the additional administrative determinations involved in the *von Bredow* case to which the Court's analysis would apply.

Respectfully submitted,

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